

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

UNITED STATES OF AMERICA, Case No. 1:10cr387  
Plaintiff, Cleveland, Ohio  
May 20, 2011

vs.

JAMES C. DIMORA and  
MICHAEL D. GABOR,

Case No. 1:10cr387  
Cleveland, Ohio  
May 20, 2011

## Defendants.

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE SARA LIOI  
UNITED STATES DISTRICT JUDGE

MOTION HEARING

## APPEARANCES:

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14   produced by computer-aided transcription.

## 1 P R O C E E D I N G S

2 - - -

3 THE COURT: Please be seated.

4 We're here on Case Number 1:10CR387, United  
15:05:43 5 States of America versus James Dimora and Michael Gabor, and  
6 the third defendant in this case was not required to attend  
7 because he has not sought a continuance.

8 This matter is to discuss the pending motions  
9 for continuance of the trial.

15:06:06 10 Counsel, if you would please identify yourself  
11 for the record and indicate who you represent and indicate  
12 if you have either government representatives or client  
13 present, and we will begin with the government's counsel.

14 MS. BACON: Thank you. Assistant United  
15 States Attorney Antoinette Bacon on behalf of the United  
16 States. With me are my cocounsel, Ann Rowland and Nancy  
17 Kelley, also on behalf United States. And the government's  
18 representatives are Special Agent Mike Massie of the FBI and  
19 Special Agent Kelly Fatula of the IRS.

15:06:35 20 THE COURT: Thank you. Next, counsel for Mr.  
21 Dimora?

22 MS. WHITAKER: Good afternoon, Your Honor.  
23 Andrea Whitaker and Bill Whitaker for Mr. Dimora, and Mr.  
24 Dimora is present.

15:06:47 25 THE COURT: Thank you. Finally.

1 MR. CHRISTMAN: Thank you, Your Honor. Leif  
2 Christman and Dave Oakley on behalf of Michael Gabor.  
3 Michael Gabor is present.

THE COURT: Thank you. All right. We had  
some limited argument on the motions for a continuance which  
have been briefed, and there are a couple of areas of  
clarification that the court would like before the court  
makes a final decision on the final disposition of this  
matter.

15:07:15 10 There's been mention regarding the number of  
11 wiretaps involved in this case, and I would like a review of  
12 the number of wiretaps with the discussion of the number of  
13 pertinent wiretaps and the number of wiretaps involved or  
14 required because of the filing of the superseding  
15 indictment.

16 So does the government have a breakdown of  
17 that nature?

18 MS. BACON: Yes, Your Honor. In total, Your  
19 Honor, there are approximately 44,290 completed sessions.  
15:07:49 20 And of those sessions, some may be duplicates. For example,  
21 if someone left a voice mail message, that could be session  
22 1. Someone retrieving the same voice mail message is  
23 session 2, but approximately 44,290.

1       And by that, the government is not representing that there  
2       aren't more pertinent calls or that each is pertinent; but  
3       that is just the categorization given by the agents at the  
4       time of the review.

15:08:26 5                     THE COURT: Okay. And then do you have a  
6       further breakdown of how many calls would have been  
7       implicated due to any adage charges in the superseding  
8       indictment?

9                     MS. BACON: I am not sure what I understand --  
15:08:42 10       I'm not sure if I am understanding your question completely.

11                  THE COURT: You've added some conspiracies in  
12       the superseding indictment and taken away some conspiracies  
13       in the superseding indictment. Maybe I can be more explicit  
14       in my questioning.

15:08:55 15                  And I am asking if you -- the government has  
16       any idea of how many calls then additionally from the time  
17       that the original indictment was filed -- it implicated a  
18       certain number of calls that were pertinent. Then the  
19       superseding indictment was filed. Some matters removed;  
15:09:16 20       some conspiracies were removed, some added. The ones that  
21       were added, how many more calls would you estimate might be  
22       involved or in that?

23                  MS. BACON: The 8 ,168 pertinent calls are  
24       calls pertinent to all of the criminal conduct, both what  
15:09:37 25       was charged originally, the superseding and perhaps other

1 uncharged criminal conduct. So the 8,168 was not solely  
2 limited to only the initial indictment. In fact, some of  
3 these have nothing to do with Defendants Dimora or Gabor.  
4 They could have been pertinent because of something that  
15:09:59 5 Kevin Kelley did or Steve Pumper or some other person.

6 But to say that each of the 8,168 calls is  
7 pertinent because of these defendants is not an accurate  
8 statement.

9 THE COURT: All right. Would the answer then  
15:10:11 10 be there are no more calls implicated than -- implicated  
11 originally or pertinent to the best -- I understand that --

12 MS. BACON: There are none added to this  
13 number, but to say originally the government contemplated  
14 using X amount of calls at the original trial, there are  
15:10:30 15 different calls that will be added to our exhibit list  
16 because of the superseding indictment.

17 THE COURT: Okay.

18 MS. BACON: So, for example, on the Mellaragno  
19 scheme, I believe there are only two additional calls.

20 THE COURT: Okay. That's the type of  
21 information.

22 MS. BACON: But they would be included --  
23 those two calls would have been included in the 8,168  
24 pertinent calls.

15:10:51 25 THE COURT: I see.

1                   MS. BACON: The removal of the Skuhrovec  
2 scheme eliminated quite a number of calls. Originally, we  
3 contemplated using approximately one to two dozen calls  
4 related to that scheme that are gone.

15:11:05 5                   So that eliminated pertinent calls that would  
6 be government's trial exhibits.

7                   The Randazzo count would probably add about a  
8 dozen calls, Your Honor, give or take, depending on how we  
9 choose to present the evidence and we haven't identified  
15:11:27 10 each of our exhibits yet so they probably wash each other  
11 out, those two schemes.

12                   THE COURT: Okay.

13                   MS. BACON: I don't believe there are any  
14 additional calls we would use because of the tax scheme  
15 because the tax is based on all of the other substantive  
16 counts, so the top of my head right now, I can't think of  
17 any additional calls that would be required because of that.

18                   There are no additional calls related to Mr.  
19 Gabor's divorce scheme or his job buys that are some of the  
15:12:07 20 RICO predicate acts that were cited in the 1962(d) count.

21                   But there may be a dozen calls approximately  
22 that relate to the RICO conspiracy only that don't relate to  
23 other schemes. But, again, because we haven't completed our  
24 trial exhibit list, that's just an approximation.

15:12:29 25                   THE COURT: Sure. Now, you've talked in terms

1       of 8,168 pertinent calls. Have those been identified in any  
2 way for the defendants?

3                     MS. BACON: Yes, Your Honor. In the index  
4 they received, they received a detailed index of the call  
15:12:48 5 session, number, the date, the time of the call, the  
6 duration of the call, I believe the call participants, and  
7 initial characterization of whether or not it was pertinent  
8 or nonpertinent understanding that there could be  
9 nonpertinent calls that are pertinent, or are pertinent in  
15:13:09 10 certain respects, not trial exhibits, but generally it's a  
11 way to segregate between --

12                   THE COURT: So all the calls have been  
13 demarcated in some fashion, pertinent versus nonpertinent.

14                   MS. BACON: Yes, Your Honor.

15                   THE COURT: So is that the only designation  
16 given?

17                   MS. BACON: I believe some may have also been  
18 designated as potentially privileged, intercepted but marked  
19 as privileged so appropriately --

15:13:40 20                   THE COURT: Which the government would not be  
21 using?

22                   MS. BACON: Yes, Your Honor, clearly.

23                   THE COURT: I think it's fair to say.

24                   MS. BACON: Yes.

15:13:46 25                   THE COURT: That's one thing we can agree on

1 for certain.

2 So we're talking about -- let's talk about the  
3 superseding indictment then if I was listening closely. No  
4 more than or -- you mentioned two dozen calls as they relate  
15:14:04 5 to -- I am sorry, one dozen as it relates to the RICO, and  
6 one dozen as it relates to Randazzo.

7 MS. BACON: Approximately, Your Honor, yes.

8 THE COURT: Perhaps two additional calls as it  
9 relates to Melaragno.

15:14:23 10 MS. BACON: Yes, with respect to those  
11 Melaragno calls, they also overlap into the obstruction  
12 count. That's why I hesitate a little there, because they  
13 could have been included in the supercede -- in the original  
14 indictment under the obstruction. But they also  
15 specifically relate to the Melaragno counts of the  
16 indictment.

17 THE COURT: All right. Does the government  
18 intend to provide transcripts of any of the pertinent calls?

19 MS. BACON: We intend to provide transcripts  
15:14:51 20 well in advance of trial of the calls that we intend to use  
21 in our case in chief.

22 THE COURT: Okay. And when will you make that  
23 -- I know it depends upon the trial date; but let's say  
24 hypothetically the trial date were September 12, how far --

15:15:07 25 MS. BACON: May I have one minute to consult

1       with the case agent?

2                     THE COURT: Sure.

3                     MS. BACON: Your Honor, we think we could have  
4                     the majority, substantial majority of that project completed  
15:15:34 5                     by the end of July.

6                     THE COURT: Okay. And that's -- you're  
7                     indicating end of July is your determination of what you --  
8                     what the government intends to use at trial?

9                     MS. BACON: Together with the transcripts.

15:15:50 10                   THE COURT: Together with transcripts?

11                    MS. BACON: Yes, Your Honor. We could earlier  
12                     than that identify the session numbers, if that would be  
13                     helpful, but to have the completed transcripts and have them  
14                     in a substantially completed form that would require some  
15                     additional time.

15:16:02 15                   THE COURT: Now, I know I hesitate to ask this  
16                     question, and I am certainly not going to hold you to it, do  
17                     you have any concept, any idea whatsoever of how many calls  
18                     might be involved? I know I am not certainly going to hold  
19                     you to it because it is -- I don't want to say it's early on  
20                     because it's not early on.

22                   The indictment was filed in September, and  
23                     it's already May, so substantial time has already elapsed  
24                     relative to this case and this matter. So do you have any  
15:16:41 25                   idea? If you don't, that's fine, of how many calls may be

1       used by the government and, therefore, identified to the  
2       defendants?

3                     MS. BACON: Yes. We haven't counted all of  
4       the calls. I can't give you an exact number. We can  
15:17:11 5       certainly say there are a number of calls that were charged  
6       in the indictment, and certainly all of those we would  
7       anticipate having as trial exhibits.

8                     So as a starting point, the number of calls  
9       listed in the indictment which obviously has been public for  
15:17:25 10      now quite some time. It's difficult to give you an accurate  
11      estimate at this point.

12                  THE COURT: No, I understand -- I can  
13      appreciate this.

14                  MS. BACON: There's a number above and beyond  
15      what is charged in the indictment. As we have in the  
16      previous trials, we will be trying to clip the calls because  
17      many of them are very long to only the most relevant  
18      portions of the calls.

19                  THE COURT: Okay. Now, you also indicated in  
20      your briefing that these are in searchable format. Can you  
21      describe what that means?

22                  MS. BACON: Yes, Your Honor. All of the  
23      discovery has been -- I should not say all, but vast, vast  
24      majority have been scanned. There are some items that are  
15:18:07 25      too bulky to scan, or tangible items, for example, a framed

1 artifact of sorts which clearly can't be scanned.

2                   But they have been scanned and provided on a  
3 disk, and the way it works is similar to a Google search or  
4 a Westlaw search, where you can type in a word and you can  
15:18:23 5 have a list then of all the documents that hit on that  
6 particular word.

7                   For example, if the defendant was interested  
8 in searching for anything related to Vandra Brothers  
9 Construction, one could type in Vandra and all of the items  
15:18:36 10 with Vandra Brothers would come on to the screen, and from  
11 there you can see where in the document that term is  
12 located.

13                  THE COURT: Okay. Now, as to Mr. Gabor, I  
14 mean, in the superseding indictment, he is charged in the  
15 RICO count plus six other counts, correct, if I've  
16 identified these?

17                  MS. BACON: I believe there are two related to  
18 Steve Pumper, a substantive count and a conspiracy, the  
19 obstruction conspiracy, the Gallucci mail fraud conspiracy  
15:19:40 20 which was the prior indictment that was reincorporated back  
21 in that was joined into this indictment, the January 2012  
22 trial that was merged into this. I believe there may have  
23 been two counts related to that, so that would be six.

24                  THE COURT: So --

15:19:57 25                  MS. BACON: I believe you're correct, Your

1 Honor.

2 THE COURT: I have -- and, of course, Count 1,  
3 which is the RICO count. Count 17, I don't know if you have  
4 the indictment before you.

15:20:10 5 MS. BACON: I don't have a copy of it here,  
6 Your Honor.

7 THE COURT: And, of course, his counsel is  
8 here, and I would think he would ought to know if I have  
9 this accurate. So Count 1, Count 17, Count 19, Count 21,  
15:20:27 10 and Count 28, 31 and 32.

11 Mr. Christman or --

12 MR. OAKLEY: Your Honor, I believe that's  
13 correct in terms of the ones he's specifically indicted  
14 under; however, the RICO conspiracy incorporates virtually  
15 every count of the indictment, and there's a number of  
16 counts of the indictment where he is mentioned as aiding and  
17 abetting or assisting in some manner without any greater  
18 specificity and we haven't had a response to the Bill of  
19 Particulars that we filed, so we really don't know.

20 THE COURT: Let's just go one step at a time.  
21 He's actually named in seven counts. The first one being  
22 the RICO and the remaining six are the ones that I just  
23 identified, 17, 19, 21, 28, 31 and 32, correct?

24 MR. OAKLEY: I believe that is accurate.

15:21:42 25 THE COURT: Do you have a response to his

1       counsel's statement regarding the RICO then involving Mr.  
2       Gabor in each and every other count?

3                   MS. BACON: Your Honor, he is correct. That  
4       is part of the RICO conspiracy. The government has to prove  
15:21:57 5       that Defendant Gabor agreed that one member of the RICO  
6       conspiracy would commit two acts of racketeering.

7                   And the government has cited as potential acts  
8       of racketeering not only the specific acts in Count 1, which  
9       are his -- the job buy and the divorce fraud, but also the  
15:22:18 10      other counts in the indictment with the exception of the  
11      count related to Landerhaven, which is not included in the  
12      RICO conspiracy. So he is right with respect to that.

13                  I'm not aware of Mr. Gabor being charged as an  
14      aider and abettor in other counts just because he is  
15      mentioned in them. I mean, clearly if he's not charged in  
16      the charging language, he's not -- if he's not named in the  
17      charging language, he's not charged with that count. And  
18      certainly, while he's mentioned perhaps in the manner and  
19      means and that may give notice to the defendant as to how he  
15:22:53 20      agreed that one or more conspirators would commit two acts  
21      of racketeering, that's not a substantive count against  
22      which he has to defend.

23                  So I think we're talking a little bit past  
24      each other here. For the RICO conspiracy, we don't actually  
15:23:06 25      have to prove that he committed two racketeering acts or

1 that someone else committed two racketeering acts, only that  
2 he agreed that someone in the conspiracy would commit two  
3 acts of racketeering.

4 THE COURT: Okay.

15:23:20 5 MR. OAKLEY: Your Honor, if I could respond?

6 THE COURT: Yes.

7 MR. OAKLEY: Counsel for the government said  
8 that those are not substantive counts that he has to defend  
9 against; however, under the RICO statute, if he's found  
15:23:30 10 guilty of having agreed to participate in these acts, he's  
11 going to prison.

12 So I would say those are substantive acts he's  
13 got to defend against because every single count in the  
14 indictment with the exception of maybe six could send him to  
15 prison if he's found to have somehow conspired to  
16 participate.

17 And only to the fact that there's an honest  
18 services act claim, we don't know if Mr. Gabor picked up the  
19 tip at Delmonico's, if that's going to be one of his two  
15:24:01 20 parts of the conspiracy to send him to prison. So this is  
21 an open-ended indictment and it is really quite impossible  
22 right now to tell exactly what my client is charged with  
23 having done.

24 THE COURT: You're saying that this 149-page  
15:24:34 25 indictment doesn't specify the charges against your client?

1                   MR. OAKLEY: It specifies the charges, but it  
2 doesn't specify things like a time or a manner. Some of  
3 these he's alleged to have showed up and played cards at a  
4 condominium. I don't know if the government's  
15:24:55 5 interpretation of honest services would include that as  
6 being a potential agreement to engage in the RICO  
7 conspiracy. That's part of the reason we filed the Bill of  
8 Particulars so we would have a better idea of what exactly  
9 of these charges my client was actually conspiring to be  
15:25:12 10 part of.

11                   You know, as the government stated, there's  
12 the RICO count. There's the six substantive charges.  
13 There's the two parts in the RICO, the two specific  
14 predicate acts mentioned in the RICO charges, and then  
15 there's anything else they might think of he may have been  
16 with and they're being very coy about whether or not there  
17 is anything there or not because they're not required to  
18 until they give us the 302s.

19                   But that puts us in the difficult position.  
20 And we have to look at, I mean, there's 44,000 calls  
21 mentioned.

22                   THE COURT: Let's correct that for the record.  
23 Somebody misstated in the briefing that there were more  
24 calls than that, and that was why I wanted that clarified  
15:26:00 25 early on.

1                    You would agree that the number of calls total  
2    is closer to the 44,000 number than I believe it was 65,000  
3    number mentioned in the briefing?

4                    MR. OAKLEY: Your Honor, I will have to  
15:26:20 5    confess to being uncertain as to which number is more  
6    accurate. I didn't do the count for the 44 or 65,000.

7                    THE COURT: You what?

8                    MR. OAKLEY: I did not personally count them  
9    to be able to say they're either 44,000 or 64,000.

10                  MS. BACON: Your Honor, I might be able to add  
11    some clarity to this.

12                  The 44,290 are the number of completed calls.  
13    There are some sessions where for some reason the call was  
14    disconnected or sometimes there's a duplicate session for  
15    one call or the call malfunctions. So when you look at a  
16    list of session numbers, it could be the 66 or 65,000  
17    number, but in terms of number of complete conversations  
18    where there's voice over the interception, it's 44,290.

19                  MS. WHITAKER: I am the one that put that  
20    number in the briefing, and I based that, Your Honor --  
21    obviously, at this moment, we have not listened to all  
22    64,000. So until we listen to them, we don't know what is,  
23    in fact, a completed call, what is a malfunction call. We  
24    certainly found some that are malfunction. We communicated  
15:27:23 25    that to the government. But the 64,000 is the number of

1 total recorded sessions we've been provided. Until we  
2 listen to them, we don't know which of those are the 44,000  
3 that are actually completed calls.

4 So that number came from me, and I think it's  
15:27:37 5 accurate on the number of recorded sessions we need to  
6 review.

7 THE COURT: Are those ones calls that are not  
8 completed and, therefore, have no recording identified? Did  
9 you hear what counsel just argued?

10 MS. BACON: Yes, Your Honor.

11 MS. ROWLAND: If we can have a moment.

12 THE COURT: Yes.

13 MS. BACON: Your Honor, the case agent is  
14 informing me that the completed calls are identified all on  
15 the index that I described earlier with the session number,  
16 the date, the time, the duration, pertinent, nonpertinent  
17 and the participants. From the index, it should be clear  
18 which are the completed calls.

19 THE COURT: The ones that are not completed  
15:28:25 20 are just hang-ups or not recorded, no voices?

21 MS. BACON: There are a number of reasons why  
22 they can be malfunctions, Your Honor, and through the --  
23 there's not one answer as to why they are malfunctions, but  
24 there's nothing there to listen to.

15:28:42 25 THE COURT: Those are not included in the

1 index?

2 MS. BACON: No, they are not on the index.

3 THE COURT: But they were given to the  
4 defendants?

15:29:04 5 MS. BACON: The way that the transfer of data  
6 worked, Your Honor, it would be on the disk, the actual  
7 malfunction session or session that doesn't have  
8 conversation in it, but it wouldn't be on the index. So we  
9 couldn't, as we were driving the data over, remove all of  
15:29:20 10 the calls that were malfunctioned; but by going through the  
11 index, you can cross-reference and see the calls on the  
12 index that's completed and click on the corresponding audio  
13 file.

14 THE COURT: So if it's not in the index, it's  
15:29:35 15 fair to say there's nothing on that session?

16 MS. BACON: Yes, Your Honor.

17 THE COURT: Okay. Why then, Ms. Whitaker,  
18 would you listen to a call that doesn't have anything  
19 recorded?

15:29:49 20 MS. WHITAKER: Well, first, if I may, we were  
21 provided with a disk that was all the Title III recordings  
22 that were taken in this case. That's what we began to  
23 review. That's what --

24 THE COURT: Did you look at the index?

15:30:00 25 MS. WHITAKER: We do have an index. And it

1 indicates some pertinent and nonpertinent calls. This is  
2 the first time that's why some things were not on the index  
3 and some things were on the index.

4 THE COURT: Did you see a pattern developing  
5 where if the call wasn't on the index, there was no  
6 information on the call that was recorded?

7 MS. WHITAKER: Every time I am opening a call,  
8 I'm not also checking the index, Your Honor. That would add  
9 minutes to every single call. I am listening to the calls  
0 that are on the disks that were provided to me. I have not  
1 every time I open a call do I go into the separate index,  
2 open it up, find that session.

15:30:52 20 MS. WHITAKER: The index, Your Honor, only --  
21 for example, there's a disk of calls from Mr. Dimora's home  
22 phone. I am listening to all the calls on Mr. Dimora's home  
23 phone. There's no reason for me to look at the index while  
24 I'm listening to all the calls of the Mr. Dimora's home  
15:31:10 25 phone. All that tells me is that it's from his home phone,

1       how long it is. The government has indicated they marked  
2       pertinent and nonpertinent, but as they have said here, you  
3       can't be guaranteed if it's pertinent, it says pertinent,  
4       it's not pertinent, it says not pertinent. In fact, we were  
15:31:24 5       required to sign a waiver saying we wouldn't rely on what  
6       the government has identified as pertinent and nonpertinent.

7                   So certainly we're not using the index for  
8       that. There really is no reason. There are times when I've  
9       been looking for specific calls on specific issues where,  
15:31:39 10       yes, I do go to the index. I find the call I am looking for  
11       and I go to the disk.

12                  But when I am listening to all Mr. Dimora's  
13       calls, all Mr. Dimora's calls from his cell, all Mr. Russo's  
14       call from a time period that is relevant, I just have the  
15       disk out and I am listening to the entire disk because  
16       there's nothing -- there's no reason for me to be going to  
17       that index. I need to listen to all the calls that were  
18       provided on those certain phones or from another person's  
19       phones during a certain time period.

15:32:08 20                  THE COURT: So you're choosing to listen to  
21       sessions that have no information on it?

22                  MS. WHITAKER: As I said, until sitting here  
23       today --

24                  THE COURT: Which you wouldn't hear anything?

15:32:19 25                  MS. WHITAKER: No, I don't hear anything, but

1 it takes 16 seconds simply to open up a call before I even  
2 know there was no information. Certainly if I immediately  
3 hear a dial tone, I stop listening because I know there's  
4 nothing there.

15:32:33 5 Sometimes you open it up and you don't hear  
6 anything for a while because there isn't anything on it.  
7 Sometimes you open it up and you don't hear anything for a  
8 while because it takes a while for them -- the equipment to  
9 go. Sometimes you open it up and you don't hear anything  
15:32:44 10 for a while because people don't start talking for a moment  
11 or two.

12 I mean, I am opening these sessions up, on  
13 especially Mr. Dimora's home and his cell, and I need to  
14 review them all and then, again, like I said, during certain  
15 specific time periods referenced in the indictment, I have  
16 an obligation to listen to these phone calls not just single  
17 one isolated in the indictment, but what was happening  
18 around that time, what was going on around that time.

19 That's how I am proceeding with reviewing this  
15:33:11 20 discovery. I don't know that there's any other way to do it  
21 to assess the circumstances in which these charges are being  
22 made.

23 MS. BACON: Your Honor, just to clarify  
24 perhaps one misunderstanding. At the time the government  
15:33:26 25 gave the discovery, Agent Massie and other members of the

1 prosecution team sat down and explained the index, the  
2 calls, the idea of the malfunctioning calls, explained why  
3 there would be some absence of -- why there's a disconnect  
4 between a hard drive and the chart.

15:33:43 5 If it would help, we've never been asked to  
6 provide, but we could provide next week an index of all the  
7 malfunctioned calls if that would facilitate the review.

8 MS. WHITAKER: I did sit down with them and we  
9 did talk about the fact there were some problems with some  
15:33:57 10 calls. I don't remember if I was told that. Again, there  
11 was a whole list of calls that they had isolated that were  
12 malfunctioned. Again, I was provided disks that were Title  
13 III discovery in this case and I began --

14 THE COURT: All right. So if the differential  
15 between your number and your brief and their number they  
16 represented today, the government's number is 20,000 calls  
17 that have malfunctioned and have no information on that,  
18 wouldn't you want to know that so you didn't open that up  
19 and take 16 seconds to do that?

15:34:26 20 MS. WHITAKER: I mean, if they can give me a  
21 list of malfunctions.

22 THE COURT: I think that's what the government  
23 just said.

24 MS. WHITAKER: That would be helpful.

15:34:34 25 THE COURT: That eliminates 20,000 sessions.

1 MS. WHITAKER: That eliminates 20,000  
2 sessions, but it does not eliminate --

3 THE COURT: Well, actually 22,000 sessions.

4 MS. WHITAKER: It does. I would imagine from  
15:34:44 5 what the government is telling me is those 22,000 sessions  
6 don't have any recording. It does not affect the total  
7 hours of recording that we also identified in our brief.

8 Am I correct about that?

9 MS. BACON: That should be correct, Your  
15:35:02 10 Honor.

11 MS. WHITAKER: So there's still 1,600 hours.

12 THE COURT: That's only if you choose to  
13 listen to calls that are not pertinent --

14 MS. WHITAKER: Again, Your Honor --

15 THE COURT: -- and don't come into the time  
16 frame that's relevant as you've described it?

17 MS. WHITAKER: Again, Your Honor, the  
18 government is the one who's identified pertinent and  
19 nonpertinent in the index. They made us sign a waiver that  
20 we would not rely upon that in any kind of court filing or  
21 statements. They said here today on several occasions that  
22 they can't guarantee it was pertinent, it's not pertinent.  
23 So I think that we cannot rely on the fact that the case  
24 agent has identified what he considers to be pertinent and,  
15:35:43 25 therefore, we don't need to listen to these nonpertinent

1 calls.

2                   Obviously, pertinent for them would be more  
3 intending to be inculpatory. I think I may have a very  
4 different perception of what I consider to be exculpatory  
15:35:56 5 pertinent phone calls. I don't think I can effectively  
6 represent my client and rely on Agent Massie, as diligent as  
7 I know he is, representation of what is in his opinion a  
8 pertinent call in defending my client. So I do need to  
9 listen to the calls that we've been provided.

15:36:13 10                   As the court is aware, the time frame for the  
11 RICO is certainly far greater than we've got the recordings  
12 for. The recordings we have go --don't start until 2008 and  
13 end -- you know, when this investigation was culminated in  
14 the indictment. That's not a long time period. There  
15 certainly was many, many things in the indictment happening  
16 during that time.

17                   MR. OAKLEY: If I could say one thing about  
18 the pertinent calls. I began my review of the wiretaps by  
19 looking at the indictment and the Title III affidavit and I  
15:36:48 20 found at least two calls in the indictment that are  
21 specifically mentioned relating to my client that were not  
22 listed as pertinent in the index that I have. So I gave up  
23 relying on the index, because it's not trustworthy.

24                   The government won't even stand behind it and  
15:37:04 25 I am certainly not going to rely on it for representation of

1 my client.

2 THE COURT: Okay. I found the number that was  
3 cited in the brief is 64,237?

4 MS. WHITAKER: Yes.

15:37:28 5 THE COURT: Recorded conversations is what the  
6 brief says. We now can agree that those are not recorded  
7 conversations, correct?

8 MS. WHITAKER: Based on the representations  
9 from the government, apparently there are many of those  
15:37:39 10 recorded sessions we received have no voice on them. So I  
11 would just simply refer the court to the total hours of the  
12 recordings, and that would cover the 44,000 or whatever  
13 number the court -- the government says actually has a voice  
14 on them.

15:37:52 15 THE COURT: Okay.

16 MS. WHITAKER: If I can clarify, when they say  
17 malfunction calls, does that mean it was a call that was  
18 dropped, or were you guaranteeing on these 22,000 calls  
19 there's no voice at all?

15:38:10 20 MS. BACON: There could be a variety of  
21 different things happening. Some could be text messages  
22 which we are not authorized to intercept and so they come up  
23 with the session but we don't have a content because it was  
24 a text. It could be an equipment malfunction. It could be  
15:38:24 25 a problem with the phone company. There could be many

1       different things. I hate to limit it to one because there  
2       are a variety of reasons.

3                     MS. WHITAKER: I understand what you're saying  
4       about the reasons. There are a variety of reasons for the  
15:38:35 5       malfunction. What I am looking for --

6                     MS. BACON: There's no audio.

7                     MS. WHITAKER: There's no audio whatsoever on  
8       these 22,000?

9                     MS. BACON: So it's not a hello, hello and the  
15:38:43 10      other person can't hear. That would be included in the  
11     44,290.

12                    MS. WHITAKER: So the 44,000 calls, that  
13       represents the nearly 1,600 recorded conversations?

14                    MS. BACON: Correct.

15                    THE COURT: When were these sessions, again,  
16       provided to the defendants?

17                    MS. BACON: Defendant Dimora received it on or  
18       about February 24, Your Honor, and I believe Defendant Gabor  
19       received it around December 20 of last year.

15:39:20 20           THE COURT: And Defendant Dimora received it  
21       in February because of the situation involving --

22                    MS. BACON: Involving his counsel, Your Honor.  
23       It took until February -- I believe February 2 was the  
24       hearing in Akron before Your Honor where the Whitakers  
15:39:37 25       discussed their representation and we organized that they

1       would be the counsel of record going forward. That took a  
2       while. And then the government met with the Whitakers  
3       almost immediately thereafter and began discussing the  
4       protective order, the discovery plan, et cetera.

15:39:55 5                     MS. WHITAKER: For the record, I will note  
6       that previous counsel had been on for quite some time and  
7       had not signed the protective order. There were -- it  
8       wasn't so they weren't communicating. There were issues  
9       they were trying to address. As soon as we got on board, we  
15:40:10 10      preliminarily agreed because we wanted to get started on the  
11     discovery. So we got it and started as soon as we possibly  
12     could.

13                     THE COURT: Okay. I guess I will ask the  
14     defendants to address the situation that this case, and I  
15     think it's reflected in the record, was, of course, filed in  
16     September of 2010; and in October, I believe, is when the --  
17     thereafter, I think it was October where there was a date  
18     set for the trial. And there was contemplation of a  
19     superseding indictment and, thereafter, that was built in to  
15:41:44 20     the selected trial date of September 12.

21                     And my question is, the argument is, well, a  
22     90-day continuance isn't that long given the RICO; but it's  
23     a 90-day continuance plus the original continuance that was  
24     factored in from originally a day of July, I believe, so  
15:42:17 25     it's July to September built-in continuance, plus a

1 continuance of 90 days that really translates to a  
2 continuance of 120 days, because a continuance of 90 days as  
3 everybody knows in this room is right in the middle of  
4 December, and if you're suggesting that I start the trial  
15:42:37 5 right in the middle of December, I don't think anyone has  
6 suggested that. So it's really you're suggesting I start it  
7 in January, which is not a 90-day continuance. It's 120-day  
8 continuance beyond the original three-month or 90-day  
9 continuance already built into the schedule.

15:43:00 10 So knowing that, I need to know what justifies  
11 that kind of continuance.

12 MR. CHRISTMAN: Your Honor, may it please the  
13 court. Leif Chrstiman on behalf of Michael Gabor. Your  
14 Honor, I was appointed to represent Mr. Gabor a couple days  
15:43:18 15 before that -- before that hearing and I don't remember  
16 specific dates as it was late last fall.

17 When I accepted the appointment, certainly,  
18 Your Honor, I had no idea of the volume of discovery. And,  
19 you know, discussing the calls that the court just gone  
20 through, that's nothing to say about the other physical  
21 documents that have been provided to us to review, as well.  
22 And I think that should be part of the equation whether the  
23 court is considering the continuance.

24 To ask the government about the specific  
15:43:54 25 documents, you know, all the scanned material, you know, I

1 think I mentioned previously about having an external hard  
2 drive that's capable of handling two terabytes, and the  
3 hundreds and if not millions of documents that have been  
4 provided, that's not went in the equation when I agreed to  
15:44:14 5 accept the appointment on this case. Those dates have been  
6 set prior to my accepting the appointment to the case.

7 THE COURT: I guess that's -- that's a point  
8 we need to address. You accepted the case knowing what the  
9 dates were.

15:44:28 10 MR. CHRISTMAN: Without having any of the  
11 discovery to make, you know, an intelligent knowing decision  
12 on that.

13 THE COURT: Well, when did you get the  
14 discovery?

15:44:39 15 MR. CHRISTMAN: I got it December 23.

16 THE COURT: When did you move for a  
17 continuance?

18 MR. CHRISTMAN: After the superseding  
19 indictment.

15:44:45 20 THE COURT: Precisely. What has changed  
21 between then when you never asked for a continuance in  
22 December or January or February or March to when you did ask  
23 for a continuance?

24 MR. CHRISTMAN: Your Honor, I briefed those  
15:44:59 25 issues and what I put in there would be that fact of the

1 RICO indictment, and what Mr. Oakley was touching on  
2 earlier, opens up the universe so the information that we've  
3 been provided that I have a duty and obligation to review in  
4 order to be prepared to go to trial. I think that  
15:45:20 5 previous -- on previous indictment could have  
6 compartmentalized the information and, you know, looked at  
7 various portions that would have relayed to specific  
8 charges.

9 But I think with the RICO indictment, Judge,  
15:45:31 10 you know, I have an obligation for a much broader universe  
11 of the information that's been given me to review and  
12 prepare for trial.

13 THE COURT: Ms. Whitaker?

14 MS. WHITAKER: Just a few points, Your Honor.  
15 In terms of the court's inquiry about why no -- you know,  
16 obviously, nobody knows the size of the discovery when they  
17 initially get the case. If it turns out that they're going  
18 to need some more time, as the government just in another  
19 case they have, they then move the court for additional time  
20 based on the complexity of the case, based on the volume of  
21 discovery. So I don't know that at the time anybody  
22 originally signs on that they ever know the answer to that  
23 question.

24 I think the -- I know I had discussions with  
15:46:13 25 Mr. Christman prior to the RICO coming out that it would be

1       somewhat immature and premature to file a motion to continue  
2       until we got the RICO indictment.

3                     As the court knows, we were hoping to get it a  
4       little earlier. We were waiting -- he was waiting for my  
15:46:26 5       discussions with him until he got the RICO indictment so he  
6       can make an informed complete single, one-time to the court  
7       a motion to continue if that was necessary.

8                     In terms of what Mr. Christman says about the  
9       need to look at the documentary, yes, I think that's  
15:46:43 10      obviously very important. If the court is looking to get an  
11      assessment of the total world of discovery we've been  
12      provided --

13                  THE COURT: You certainly can address it.  
14      That's why we're here.

15:46:52 15                  MS. WHITAKER: Yeah. I appreciate the court  
16      giving us an opportunity to do that.

17                  We have been pro -- the government is correct.  
18      There are some items that are not contained in the disk that  
19      we've been given. I don't know that I would go far as to  
20      say there are a few; things are just too bulky. This is the  
21      index of items that are not included in the discovery. Some  
22      of these items include computers, so we're not -- parts of  
23      evidence from search warrants, so we're not talking about a  
24      few big pictures of blueprints.

15:47:21 25                  We're talking about a large volume of

1 information that is not also included in the huge volume of  
2 information provided on the two terabyte hard drive.

3 So it's not a minimal -- it's certainly not a  
4 minimal. For example, they're divided into different  
15:47:39 5 sections, and by far, the biggest section, so I'm not trying  
6 to claim that all of them are big, but by far the biggest  
7 section is the 352 gigabits. That contains, Your Honor,  
8 2,476,000 some files. Now, everything is duplicated.

9 There's two of everything in there. So it really means that  
15:48:00 10 there are 1,240,000 files on this one section of discovery.

11 We are talking about an incredible, an  
12 incredible volume of discovery to review in addition to the  
13 recordings. And until you get that handed to you, there's  
14 simply no way to contemplate the amount of time it's going  
15:48:21 15 to take to go through that. We're certainly also not  
16 discussing here any Jencks material or any other material we  
17 haven't received yet. Obviously that will add to that.

18 But just in terms of giving the court an  
19 overview of the amount of discovery that we simply have to  
15:48:38 20 go over.

21 In terms of the exploring the idea that this  
22 was originally going to be set in July, and then September  
23 was chosen because it's such a more complex case, obviously  
24 we weren't involved in the case. If I had been, I certainly  
15:48:54 25 would have said a month and a half, which is really what

1       that is, it wasn't the whole month of July, whole month of  
2       August, whole month of August, who month of September. It  
3       was a much more limited, I believe, time that was factored  
4       in there. I just don't think even that was enough to  
15:49:07 5       account for the complexities.

6                     THE COURT: Maybe 60 days.

7                     MS. WHITAKER: I just don't think it was  
8       enough to account for the complexities of this case.

9                     As I mentioned in one of our briefing that the  
15:49:20 10          court's local rules provides 24 months.

11                    THE COURT: You know, I don't argue the civil  
12       rules. The civil rules of discovery are very vastly  
13       different than the criminal rules. You know that; I know  
14       that. So we're not going to go down that path because it's  
15:49:43 15       not very persuasive.

16                    MS. WHITAKER: I apologize. I just thought  
17       this was document intensive. That's why I referred to those  
18       more related. Certainly won't argue it if the court is not  
19       interested in hearing it.

15:49:56 20           THE COURT: I'm not interested in hearing it  
21       because unless you're going to have your client sit for  
22       deposition in this case like defendants are required to do  
23       in civil cases, then it's just clearly not pertinent.

24                    MS. WHITAKER: We're certainly not going to do  
15:50:10 25       that.

1                   THE COURT: Okay. It's not pertinent, and we  
2 would agree.

3                   MS. WHITAKER: In terms of, you know, we  
4 received the discovery as they indicated end of February.  
15:50:18 5 As I am sure, I will hope the government can attest, they're  
6 well aware that we are jumped right in and started. We  
7 filed several letters. Every time we have come up with a  
8 problem, an issue with discovery, which there have been  
9 several, we've contacted them.

15:50:33 10                  They've been very expedient in getting back to  
11 us, but, again, we don't know about these issues until we  
12 get them. It wasn't until I was sitting here today that I  
13 knew I could eliminate 22,000 recordings.

14                  THE COURT: I think it's 20,000. I think  
15 it's --

16                  MS. WHITAKER: 20,000 recordings. And I am  
17 certainly very glad to do that. I don't think, however, it  
18 doesn't change the numbers that I added in my brief which  
19 was we're talking about 1,600 hours of recordings and nearly  
20 40-hour work weeks to play those.

21                  I understand the court -- maybe I am  
22 misunderstanding the court that there's some indication that  
23 I might not need to listen to most of those. I disagree  
24 that -- that my obligation is to listen to those. This is  
15:51:17 25 actually a very discrete period of time in the whole range

1 of the RICO indictment. It is a period of time where all  
2 these individuals that were recorded, and I don't think I  
3 can say who they are because of the protective order, but  
4 the court's aware all these individuals are important  
15:51:34 5 players in this case. All their calls just during the small  
6 limited time period were recorded. There are a lot of  
7 charges that are occurring during this time period.

8 I am looking for both inculpatory, as well as  
9 exculpatory information.

15:51:49 10 We were notified there have been two calls  
11 listed in the indictment that were noted as not pertinent in  
12 the thing, and I don't think that that is by any means any  
13 attempt to misrepresent anything by the government. I think  
14 it's just dealing with this volume of calls. And that is  
15 why we cannot rely on the index to determine which calls we  
16 can't listen to and we calls we can listen to.

17 THE COURT: Okay. Thank you. Do you care to  
18 respond?

19 MS. BACON: Thank you, Your Honor. A couple  
15:52:16 20 of issues about the time frame.

21 Mr. Christman was appointed as counsel for  
22 Michael Gabor on November 8, and on November 9, Judge  
23 O'Malley issued the trial order that set forth the relevant  
24 dates including the trial dates.

15:52:30 25 We met with Mr. Christman on November 29,

1 2010. That was the meeting as stated in our brief where we  
2 told him the exact scope of the superseding indictment  
3 including that the RICO conspiracy contemplated all of the  
4 substantive counts that were in the then current indictment.

15:52:49 5 So as of November 29, 2010, he knew that he  
6 had to go beyond the counts -- substantive counts charged in  
7 Defendant Gabor and he needed to start preparing for all of  
8 the counts.

We also told him about the additional schemes,  
the nature of the additional schemes that would be added and  
had other discussions, including the fact that he would need  
to produce a two terabyte external hard drive. He sent us a  
letter on December 7, 2010, enclosing the internal hard  
drive for us.

15:53:21 15 As of December 7, there's no misunderstanding  
16 about the scope of discovery from Defendant Gabor's  
17 perspective. He knew it was going to be two terabytes full  
18 of information, and he had all of that material on or about  
19 December 23, 2010. So within two weeks of him providing us  
15:53:40 20 the signed protective order and the hard drive, he had  
21 everything.

22 In terms of Defendant Dimora and the scope of  
23 discovery, our notes of the February 2, 2011 in Akron  
24 reflect that the Whitakers, Attorneys Whitakers acknowledged  
15:53:57 25 that they knew through former counsel, Dick Lillie, the

1 scope of discovery; they were aware of the complexity; they  
2 discussed the dates; they are prepared to meet those dates,  
3 and they agreed to be bound by those dates.

4 And at that time, Mr. Lillie knew the scope of  
15:54:15 5 discovery, because as Ms. Whitaker indicated, we had been  
6 having regular conversations about the scope of the  
7 protective order and other issues related to discovery, and  
8 he actually had some of the discovery through a limited  
9 protective order as it related to some contemplated  
15:54:30 10 depositions and within that included Jencks material, some  
11 material that could be considered as Brady and Giglio  
12 material. And they had that as early as November 16, 2010.

13 And I am also informed, Your Honor, that  
14 Attorney Lillie actually provided to the government the  
15 necessary hard drives to transfer all of the information.  
16 So certainly, before the February 2, 2011 hearing, everybody  
17 in the Dimora camp understood the size of the discovery, the  
18 scope of the indictment, the type of material and even had  
19 samples through the material provided on or about November  
15:55:12 20 16, 2010 of the type of material we were all contemplating.

21 MS. WHITAKER: May I respond?

22 THE COURT: Yes, please.

23 MS. WHITAKER: Okay. Thank you. First, I  
24 would just like to point out that they're correct. Mr.  
15:55:25 25 Lillie was given some discovery. And I have not even

1        included any of that discovery in the numbers that I'm  
2        talking about here because it was received early on and I  
3        didn't think it was fair to include that in the volumes of  
4        discovery we need to review. But that is in addition --  
15:55:38 5        what she's talking about is in addition to all the things  
6        I've informed the court of.

7                  In terms of this switching the lawyers, I  
8        think it's important to point out and I understand the court  
9        -- or I am sensing a concern that it was the problem with  
15:55:52 10      the lawyers that did not let us get involved until February.  
11     It's important to point out that Mr. Lillie sought to stay  
12     on this case. He asked to be appointed to the case. They  
13     went out looking to switch a legal team midway. Mr. Lillie  
14     sought to be appointed.

15:56:09 15                  The court was very well aware of Mr. Dimora's  
16     many attempts to obtain a loan on his home. Those were  
17     unsuccessful until we were able to make further negotiations  
18     with the government and the court declined to appoint Mr.  
19     Lillie.

15:56:23 20                  So that I think is important to note that it  
21     wasn't as if it was just a wholesale decided to delay things  
22     by switching lawyers. Mr. Lillie sought to be appointed in  
23     the case, so there would be no break in representation.

24                  The court debated -- made the decision not to  
15:56:39 25     appoint him and that's why we got involved.

1                   In terms of --

2                   THE COURT: Wait a minute. The court did  
3 appoint counsel. So it wasn't like counsel wasn't  
4 appointed.

15:56:49 5                   MS. WHITAKER: Right, but it was -- the lag  
6 between Mr. Dimora not going with the court's appointed  
7 counsel was a week or two. That certainly can't be blamed  
8 for any delay in this case. I just -- I want to make it  
9 clear that the delay the government refers --

15:57:05 10                  THE COURT: You're saying that the situation  
11 you worked out with the government relative that permitted  
12 you to remain on wouldn't have applied if Mr. Lillie wished  
13 to go that route?

14                  MS. WHITAKER: I am sure that they -- he could  
15 have worked the same thing out. He just didn't.

16                  THE COURT: That's the whole point. You are  
17 trying to say that the government wouldn't do that. You are  
18 alluding or intimating that the government wasn't willing to  
19 do that. I mean, they did it for you.

15:57:32 20                  MS. WHITAKER: That is not -- if I alluded to  
21 that, I apologize, because that is --

22                  THE COURT: In other words, if it would have  
23 been broached with Mr. Lillie or if Mr. Lillie would have  
24 approached, you don't see that would have had any different  
15:57:45 25 treatment than you were given?

1                   MS. WHITAKER: No. I don't mean to suggest  
2 the government wasn't cooperative in this. I think Mr.  
3 Lillie did broach the topic with the government. I think he  
4 did tried to work this out. I think Mr. Dimora had nine  
15:57:55 5 attempts or some number to get funding to retain a lawyer.

6                   It just didn't happen, and he kept trying, as  
7 the court was aware of it. That's why Mr. Lillie sought to  
8 be appointed. The government never withheld any approval to  
9 do that.

15:58:09 10                  If I intimidated that, I certainly didn't mean  
11 to. They've been nothing but cooperative, so I don't mean  
12 to allude that at all.

13                  The only thing I am trying to do is clarify  
14 that there wasn't some sort of attempt to delay by switching  
15:58:26 15 attorneys. That's what I wanted the court to understand is  
16 that Mr. Lillie --

17                  THE COURT: Because there wouldn't have been a  
18 delay at all had Mr. Lillie made the same arrangements that  
19 you've made?

15:58:35 20                  MS. WHITAKER: Well, I think that he closely  
21 did. I just think that there was several, several no's from  
22 several, several banks before Mr. Dimora was able to get the  
23 funding he needed, so I think that he attempted to do both.

24                  I think Mr. Lillie was diligent in attempting  
15:58:50 25 to get appointed or help Mr. Dimora find funding for

1 retained counsel.

2 MS. ROWLAND: Your Honor, if I might just  
3 briefly explain, because the government was a little more  
4 involved in that aspect of things.

15:59:01 5 From the beginning, just as Ms. Whitaker just  
6 clarified, the government was always willing to subordinate  
7 its interest in the forfeiture to a bank so that the  
8 defendant could obtain the funds he eventually did obtain  
9 and any delays were solely between the defendant and the  
15:59:21 10 bank he was dealing with. The government wasn't involved at  
11 all other than signing the paperwork along the lines we  
12 agreed to do in the beginning.

13 And the reason that discovery did not occur  
14 while Mr. Lillie was representing the defendant was simply  
15 because I think we can see now in hindsight the relationship  
16 had broken down, and although Mr. Lillie was willing to sign  
17 the limited protective order so that we could provide the  
18 discovery with respect to the Payne deposition that had been  
19 anticipated, it got to the point where Mr. Lillie would not  
15:59:52 20 sign the protective order for the broader discovery, and  
21 that was why we hit an impasse on our ability to deliver the  
22 rest of the discovery.

23 THE COURT: Was that issue ever brought to the  
24 court's attention formally?

16:00:07 25 MS. ROWLAND: I believe by the time, without

1       checking the record, it's difficult to say with certainty,  
2       but I think by the time that became clear, Mr. Lillie had --  
3       it was almost simultaneous with his motion to withdraw.

4                     THE COURT: Okay. All right.

16:00:22 5                     Ms. Whitaker, anything else to add?

6                     MS. WHITAKER: If I may just have one second,  
7       Your Honor.

8                     THE COURT: Sure.

9                     MS. WHITAKER: I think that in terms of the  
16:00:39 10       recordings -- another thing -- the only thing we've given is  
11       the amount of recorded hours, if there was some button to  
12       hit to have it play straightforward. Each of these  
13       recordings, you know, obviously -- they don't roll from one  
14       to the other. You need to go to each one and open each one  
16:00:56 15       and that's several seconds to do that, and even with now  
16       that I've discovered I only have to listen to 44,000 instead  
17       of 62,000 or whatever the number is, we're still talking  
18       that in and of itself obviously takes a tremendous amount of  
19       time.

16:01:11 20                     I just -- we got on this case, and we  
21       obviously will and always will abide by the court's  
22       deadlines is what you do as an attorney. We have an  
23       obligation, however, to inform the court after getting the  
24       discovery that we believe as officers of the court as those  
16:01:31 25       tasks with giving Mr. Dimora's constitutional effectiveness

1       of counsel, we have an obligation to notify the court that  
2       without additional time to review the mass amount of  
3       discovery we've been given by the government, we simply will  
4       be at a severe disadvantage.

16:01:46 5                   It will affect our ability to effectively  
6       prepare for trial, and that's why we brought it to the  
7       court's attention. If you know, we did not bring it to the  
8       court's attention until the government affirmatively  
9       represented in its opposition to Mr. Gabor that there was  
16:02:00 10      something to be gleaned from the idea that we did not make a  
11      motion to continue.

12                   We -- once that statement was made, we felt an  
13      obligation to inform the court we absolutely think more time  
14      is necessary. We think that we are, again, at a grave  
16:02:16 15      disadvantage if we don't have time to adequately review the  
16      mass amount of discovery.

17                   And while I appreciate the knowledge that  
18      there are less recordings, it does not affect the hours that  
19      I gave the court, and I think that the original time, the  
16:02:35 20      original dates, the September date would not have -- the  
21      July date certainly would not have adequately allowed time  
22      for that and the extra time that was contemplated by the  
23      court, nobody had the discovery. Obviously, sure they can  
24      tell us there's a whole lot of recordings; there's a whole  
16:02:51 25      lot of documents.

1                   But until you have that information in front  
2 of you, you cannot -- it's just impossible to accurately  
3 assess the time necessary to review this information to  
4 prepare for trial and that's all we're asking for, Your  
16:03:07 5 Honor, is enough time to effectively prepare for trial.

6                   THE COURT: You've asked -- you're suggesting  
7 90 days. You are, in essence, asking for 120 days, and I am  
8 asking you how do you justify the number of days requested?

9                   MS. WHITAKER: I mean, quite honestly, Your  
16:03:26 10 Honor, I certainly think that we've asked for what we  
11 consider to be the limited amount of time. I think we could  
12 use any extra time. Obviously, we're not going to ask the  
13 court for a year, but we could easily spend that time. So  
14 we've -- we've looked at this discovery and determined what  
16:03:42 15 is the least amount of time that we can come up with to  
16 review this discovery, and that's what Mr. Christman asked  
17 for.

18                   THE COURT: You've indicated to the court at  
19 the last hearing you could be ready -- you could be ready in  
16:03:56 20 November was your representation.

21                   MS. WHITAKER: What we said to the court in  
22 response was we would appreciate any additional time. The  
23 court said, could you be ready in November. We said if 60  
24 days is all we can get, we will be ready in 60 days.  
16:04:09 25 Obviously, if the court denies this motion, we have to be

1 ready in September. But what we're saying is, you know, I  
2 agree with Mr. Christman, an additional 90 days is  
3 necessary.

4 And, obviously, the government has indicated  
16:04:21 5 and the court indicated -- everybody has indicated that does  
6 create unworkable time because of the holidays and some  
7 trial scheduling issues for the government, I believe, but  
8 the number of 90 days is certainly what I would consider to  
9 be a minimal amount of what we would need to be necessary.

16:04:41 10 THE COURT: Okay. Mr. Oakley, anything  
11 further?

12 MR. OAKLEY: Yes, Your Honor, just briefly. I  
13 do want to discuss, because I don't want everybody to be  
14 concerned about the wiretaps. In term of the documents,  
16:04:51 15 I've worked on several class actions. I am used to dealing  
16 with a large number of documents.

17 And, you know, I've looked at -- we have a  
18 29-page index of documents which initially seemed pretty  
19 helpful. I looked at, for example, the Dimora office.  
16:05:04 20 There's 240 files in there. Taking into account the  
21 duplicates, that's 148 files.

22 To put a workable index together, because  
23 they're not indexed beyond this 30 days, it just tells you,  
24 you know, Dimora office, so that index brings me to about  
16:05:20 25 maybe 148,000 pages.

1                    You know, to properly index that to look at  
2 everything, it might take 200 hours, maybe a little bit  
3 less, maybe a little more. But then when I look at the  
4 Russo office, which is 61 items, I thought it would be about  
16:05:36 5 the same, it turns out there's 163,979 files in that. I'm  
6 not sure how I am going to manage that because looking at  
7 each of those files for only one minute would take 16 months  
8 of 40-hour weeks. I am sure I will figure out some way to  
9 narrow that down. But, you know, any additional time is  
16:05:57 10 going to be helpful just to try to figure out what exactly  
11 are in these documents, even narrowing them down to just the  
12 absolute bare bones parts of the indictment.

13                   The problem is with these documents, what  
14 might be relevant is like a salt sprinkled into a bucket of  
16:06:16 15 sand. You know, I have to look at everything, and in terms  
16 of the auditor's personnel records, there's 195,900 files  
17 there. They're divided in 80 folders. I've already figured  
18 out I probably only have to look at 25 percent of those.  
19 But they are not searchable. They're in a TIP format  
16:06:35 20 instead of a PDF format, which means they can't be searched.

21                   But they're handwritten and with a PDF format  
22 and optical character recognition software, it only picks up  
23 very cleanly scanned originally typed information. If  
24 something has been handwritten in, it won't come up. And I  
16:06:50 25 am not so optimistic to think that only those documents that

1       are relevant to my client are going to somehow have his name  
2       on it.

3                                  There's a lot of documents that, you know, I  
4       really need to look through everything to be sure and  
16:07:03 5       certainly within that terabyte, there's a lot that doesn't  
6       need to be reviewed. But there's still many hundreds of  
7       hours that need to be reviewed and that's all got to be done  
8       before we get the 302s. Because as soon as we get the 302s,  
9       we're not going to do anything else but the 302s and this  
16:07:19 10      has to be indexed.

11                                 I can't just read it once. I've got to index  
12       this stuff because if something comes up in a 302 that I  
13       have yet to find out about, I need to be able to find it  
14       within a couple of seconds. It's not good enough to have an  
16:07:32 15      index that keeps you within -- I think I worked out the  
16       Russo's office to be somewhere between 10 to 100 million  
17       pages of documents. I need to have a much clearer idea.

18                                 So, you know, any additional time is extremely  
19       helpful to be able to effectively prepare this case for  
16:07:51 20      trial due to the overwhelming body of documents that we have  
21       and the overwhelming number of 302s we will be eventually  
22       receiving.

23                                 THE COURT: Okay. Does the government wish to  
24       address the documents as opposed to the wiretaps. It sounds  
16:08:07 25      like there's a sizable amount.

1                   MS. BACON: There is, Your Honor. The number  
2 can be also misleading in terms of the amount of time it  
3 takes to review. As Mr. Oakley mentioned, when you get into  
4 the auditor's office files, and at risk of violating the  
16:08:19 5 protective order, I hate to talk about too many categories,  
6 one large category are personnel files. Another very, very  
7 large category are property tax records.

8                   So you can see when you're reviewing those  
9 right away, that's a lot different from a one-page  
16:08:34 10 handwritten note that maybe was found on somebody's desk.

11                  And that it's easier to say, I want to look at  
12 this property and take a look at that particular file,  
13 rather than look through a large amount of property tax  
14 records.

16:08:46 15                  In other cases, a document might be 200 pages  
16 long, but it's an employee manual, and it's the same  
17 employee manual that was found in five different places. So  
18 after seeing one employee manual, it's quite easy to click  
19 through. So the number of pages at first blush sounds like  
20 a monumental task, but when you start to consider the types  
21 of documents, the review actually goes much more quickly  
22 than it would be if it was 1,000 single page letters that  
23 had to be read.

24                  Your Honor, if it is easier for the review, we  
16:09:40 25 had made available all of the actual physical, tangible

1 evidence, so to the extent that it takes too long to thumb  
2 through the individual files, if defense counsel thought it  
3 would be easier to actually see the hard copy documents so  
4 you can tell right away if whole boxes are relevant to  
16:09:56 5 something they're searching for, that has been and will be  
6 an available option. All they have to do is contact us and  
7 we can schedule a review of anything on the indexes that  
8 they've received.

9 MR. OAKLEY: If I could respond to that point,  
16:10:13 10 Your Honor.

11 THE COURT: Sure.

12 MR. OAKLEY: Frankly, I don't see that as  
13 being particularly helpful, aside from having to go through  
14 arranging a trip of walking into a, I don't know, warehouse  
16:10:22 15 full of paper and trying to figure out which bankers box to  
16 even start looking at. It will probably be an hour before I  
17 would be able to tell whether or not I can accomplish that.

18 Thank you.

19 THE COURT: All right. Let's just consider  
16:10:46 20 some potential options and then the court will make its  
21 determination so that this case can proceed with some  
22 certainty relative to the dates.

23 So one option is obviously to keep the  
24 September trial date.

16:11:10 25 The other option is to give a continuance as

1       requested which, in essence, is a continuance to the  
2       beginning of January. Even though it's suggested as a  
3       90-day continuance, I am certainly hoping that that wasn't  
4       disingenuous knowing that the trial could not for many  
16:11:30 5       reasons start in mid-December unless of course that truly  
6       was your request, and you were indicating that was not.

7                     MS. WHITAKER: Your Honor, we did not put --  
8       we joined with Mr. Christman.

9                     THE COURT: Mr. Christman, were you suggesting  
16:11:43 10      that?

11                  MR. CHRISTMAN: Your Honor, that was my  
12       number, but certainly this court wouldn't think that, you  
13       know, there was anything disengenuous about number of days  
14       for the continuance or any of the reasons that I put in my  
16:11:55 15       various motions for the continuance, Your Honor. Truly,  
16       this is a case that has tremendous amount of material to  
17       review.

18                  THE COURT: I only say that because 90 days  
19       takes us -- I mean the month -- there's been an indication  
16:12:17 20       that this trial may last as long as three months. Is that  
21       correct? Is that still everyone's estimate?

22                  MR. CHRISTMAN: When I put that 90-day  
23       continuance in, I wasn't thinking September, that puts this  
24       day. It really did not cross my mind. What would be the,  
16:12:33 25       you know, 90 days from September 12. That wasn't part of

1 any of my thought process, and --

2 THE COURT: Okay. You will -- you admit the  
3 math that you really need 120 days, closer to 120 days?

4 MR. CHRISTMAN: Sure. Yes.

16:12:51 5 THE COURT: I'm not suggesting you ought to  
6 get that. I am just saying let's just be honest about what  
7 we're requesting. You are saying 90 days to January. 90  
8 days to January doesn't calculate to 90 days from the trial  
9 date. True?

16:13:12 10 MR. CHRISTMAN: True.

11 THE COURT: All right. So if -- we've  
12 discussed this to some extent. I want to know how  
13 problematic it would be then if we pick some interim date  
14 versus a January date, and we're going to consider all three  
16:13:28 15 potential options. There are obviously multiple options,  
16 but I am going to issue my decision on the trial date come  
17 January -- I'm sorry, come Monday as whether it's January,  
18 somewhere in between, October, November, or September, as  
19 presently scheduled.

16:13:51 20 And I just want to hear one last time any  
21 potential arguments or problems anyone can foresee besides  
22 the obvious that's been argued relative to the September  
23 dates as it pertains to the defendants. So now is your last  
24 chance, because Monday I am going to issue the order. And I  
16:14:13 25 will say this: If, if I give a continuance, I trust that I

1 will not have another request for a continuance?

2 MR. CHRISTMAN: Got my word, Your Honor.

3 MR. WHITAKER: Yes.

4 MS. BACON: Certainly we will not ask for a  
16:14:38 5 continuance, Your Honor. Our position is we're ready to go  
6 September 12. We've done everything we can to keep the  
7 September 12 date, and we absolutely prefer a September 12  
8 date. If the court believes that after weighing all the  
9 options that's not possible, considering the length of the  
16:14:56 10 trial and the difficult time we may have seating a jury  
11 because of the length of the trial, the government is  
12 concerned that if the trial goes over the holidays that,  
13 one, it might be impossible to seat a jury to find someone  
14 who doesn't already have plans during that time period, or  
16:15:12 15 to be able to somehow not be inappropriately exposed during  
16 a time when people are mingling with family and friends. We  
17 think it would be in the best interest of everybody to start  
18 it in early January, mid-January.

19 THE COURT: All right. I will issue the  
20 decision on Monday, and I will issue with the decision a  
21 schedule, a case management plan that will cover everything  
22 from pretrial motions to motions in limine, which are  
23 different, to all the way up through trial, jury  
24 instructions.

16:15:52 25 And we will maintain the dates. I have a duty

1 to make an analysis not only as it pertains to the  
2 defendants, but also the government and the public have  
3 rights in this analysis. The public has a right to a speedy  
4 trial.

16:16:16 5 And I understand that the case has been  
6 designated as complex, and I understand all of the arguments  
7 that have been made relative to the numbers of documents and  
8 the breadth and depth involved in the discovery, but it  
9 seems to me if counsel takes on a case after dates have been  
16:16:33 10 set, it is incumbant upon them to make sure that they have  
11 the ability to do what they have undertaken.

12 Now, I also understand the argument that  
13 sometimes you can't know for certain how things are going to  
14 unfold, and I also understand the arguments that until you  
16:16:53 15 receive the superseding indictment, you just can't know for  
16 certain, despite all the good will and good intentions there  
17 might be in conveying the information in advance.

18 So I am well aware of all those arguments. I  
19 am well aware of the interests of the public and the  
20 interests of the defendant when it comes to speedy trial and  
21 when it comes to proper preparation for trial.

22 And I will make my ruling in consideration of  
23 all the factors that I am required to consider when  
24 considering these motions for continuance.

16:17:44 25 Is there anything further?

1                   I do think we have one issue that I want to  
2 see if we can resolve, because I don't want any more delays  
3 in this case. There's been a recent motion filed relative  
4 to some discovery, and I want counsel in my chambers so that  
16:18:01 5 we can see if we can resolve this quickly. We cannot  
6 continue to have stops and starts in this case relative to  
7 discovery.

8                   That is not the way we're going to run the  
9 case; okay? So I need to talk to counsel because I want  
16:18:18 10 this issue resolved posthaste.

11                  So with that, I appreciate your attendance. I  
12 appreciate your providing me more detailed information  
13 relative to the discovery, and the court will issue its  
14 ruling relative to the date on Monday, and that will be the  
16:18:43 15 end of the discussion relative to the trial dates.

16                  That will concludes this hearing.

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1 C E R T I F I C A T E  
23 I certify that the foregoing is a correct  
4 transcript from the record of proceedings in the  
5 above-entitled matter.

6

7

8 s/Lori A. Callahan

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